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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments	)	
Implementation of the Local Competition in the Telecommunications Act of 1996	)	CC Docket No. 96-98

COMMENTS OF THE
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

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SUMMARY

This is an unparalleled opportunity to expand consumer choices for broadband telecommunications services and stimulate competition in the local telecommunications marketplace. The Commission can be the catalyst for opening up literally millions of multi-tenant environment ("MTE") buildings in this country that house a significant portion of America's workers and residents. Allowing the American people to use new fixed wireless alternatives will give them an alternative to their monopoly service provider. At last, they will have the benefit of advanced, broadband *wireless* technologies.

Wireless broadband solutions offer a host of advantages over fiber, copper wire, and cable technologies. Wireless can be deployed rapidly within buildings. Wireless avoids the need to dig trenches that disrupt communities. Wireless deployment can grow as consumer demand grows, with efficiencies for both customers and providers. Most importantly to consumers, wireless broadband services can provide a full range of telecommunications services, including fixed voice, high speed data, Internet access, multi-channel video, video conferencing, virtual private network services, and distance learning.

Wireless broadband should grow at a compound average growth rate of 75.6 percent through the year 2004. But this growth, and indeed the very survival of fixed wireless alternatives, is dependent on Americans having the opportunity to choose wireless to give them broadband communications in their homes and workplaces.

MTE residents and businesses must have this choice. Nearly one-third of Americans reside in MTEs, and most small and medium businesses are located in such environments. Standing between these consumers and their wireless service providers of choice is the lack of reasonable and non-discriminatory access to building rights-of-way, rooftops, and riser conduits.

The Commission can and must ensure that all Americans have the right to freely choose wireless broadband technologies and services. Without the Commission's help, wireless providers assuredly will be precluded from serving a significant segment of Americans—frustrating the pro-competitive goals of Congress as set forth in the Telecommunications Act of 1996.

Non-discriminatory access to MTEs is wholly consistent with the Commission's local competition policies. It is also consistent with Congress's goal of creating multiple consumer choices for local telecommunications services. A review of applicable precedent and the statutory language and legislative history of several provisions of the Communications Act of 1934, as amended—namely Sections 224 and 706—demonstrates that the Commission is well within its jurisdiction to adopt a non-discriminatory access requirement.

The Commission's building access initiative should incorporate several fundamental principles. These principles will prove beneficial not only to wireless providers, but to building owners and consumers. The building access rules and policies adopted by the Commission should:

- Impose a non-discriminatory access requirement on commercial and residential MTE building owners.

- Ensure service providers reasonably compensate building owners for access to their buildings.
- Prohibit exclusive access arrangements between building owners and carriers.
- Require installing carriers to assume installation, maintenance and damage costs.
- Prohibit building owners from charging tenants for selecting their carrier of choice.
- Require reasonable accommodation of space limitations.

The Commission has been an enthusiastic supporter of the revolution in fixed wireless communications, allocating the necessary spectrum in bands such as 24, 28, 31, and 39 GHz that are the essential raw materials for wireless broadband networks. PCIA applauds the Commission for taking the first steps to ensure that fixed wireless technologies play a role in bringing the benefits of the broadband revolution to the millions of Americans who live and work in multi-tenant environments. To complete these networks and link them to willing consumers in MTEs, operators must have access to the rooftops, risers, conduits, ducts, and other rights-of-way that, until now, have been given over to utilities. The Commission's adoption of its Competitive Network proposals is the essential next step to bringing the promise of wireless broadband to reality for these Americans.

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COMMENTS OF THE
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

The Personal Communications Industry Association ("PCIA")[1] hereby submits these comments in response to the Notice of Proposed Rulemaking ("*NPRM*") adopted

[1] PCIA is an international trade association established to represent the interests of the commercial and private mobile radio service communications industries and the fixed broadband wireless industry. PCIA's Federation of Councils includes: the Paging and Messaging Alliance, the PCS Alliance, the Site Owners and Managers Association, the Private Systems Users Alliance, the Mobile Wireless Communications Alliance, and the Wireless Broadband Alliance. As an FCC appointed frequency coordinator for the Industrial/Business Pool frequencies below 512 MHz, the 800 MHz and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and

(Continued...)

by the Commission on June 10, 1999, in the above-captioned proceeding.[2] PCIA applauds the Commission's efforts to present the critical issues raised in the *NPRM* for public discussion and, more importantly, quick resolution.

This proceeding involves nothing less than creating the opportunity for nearly one-third of U.S. business and residential consumers to choose a wireless alternative for receiving the next generation of advanced, broadband communications services. Over the last few years, the Commission has taken the important first step to ensure that consumers have a wireless broadband service alternative with spectrum allocations and license assignments at bands including 24, 28, 31 and 39 GHz. The Commission should now take the next step of ensuring that customers in multi-tenant environment ("MTEs") have access to these technologies.

PCIA believes that providing the significant portion of American consumers living and working in MTEs with a choice of wireless broadband services demands a national

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conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of FCC licensees.

PCIA's Wireless Broadband Alliance is made up of licensees authorized by the Commission to provide terrestrial, fixed, broadband wireless services in various frequency bands. PCIA's members accordingly have a vital interest in this proceeding and will be directly and significantly impacted by the rules and policies adopted by the Commission in this proceeding.

[2] *Promotion of Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 99-217, CC Docket No. 96-98, FCC 99-141 (rel. July 7, 1999) ("*NPRM*"). By *Order*, DA 99-1563 (rel. Aug. 6, 1999), the dates for filing comments and reply comments on the *NPRM* were extended until Aug. 27 and Sept. 27, respectively, while the filing dates for the *Notice of Inquiry* were extended to Oct. 12 and Dec. 13, 1999.

solution based upon the principles of non-discriminatory building access. Otherwise, wireless operators will continue to encounter unfair challenges and obstacles in the marketplace which, if left unchecked, will deny consumers a choice and preclude the full potential of wireless carriers to effectively compete in the telecommunications market, particularly against incumbent local exchange carriers and video providers.

I. INTRODUCTION AND BACKGROUND

In keeping with the objectives of the Telecommunications Act of 1996,[3] the Commission must ensure that the benefits of facilities-based competition are realized in local telecommunications markets. This "Competitive Networks" initiative addresses the primary impediment to current and prospective wireless carriers' ability to bring their advanced telecommunications networks to bear in the marketplace: reasonable and non-discriminatory access to rights-of-way, rooftops, and riser conduits in MTE buildings.

The Commission has repeatedly recognized that Congress, in adopting the 1996 Act, sought "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[4] To that end, the Commission has authorized fixed broadband services, particularly the Local Multipoint Distribution

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[3] Telecommunications Act of 1996, Pub. L. No. 104-104 Stat. 56, 110 Stat. 70 *codified at* 47 U.S.C. §§151 *et seq.*

[4] S. Cong. Rep. No. 104-230 at 1 (1996) (*"1996 Conference Report"*). *See NPRM* ¶ 2.

Service ("LMDS"), with the expectation that such services would serve as a meaningful, realistic alternative to existing wireline services.[5] Indeed, wireless broadband services encompass a full menu of telecommunications offerings, including fixed voice, high speed data, Internet access, multichannel video, video conferencing, virtual private network services, and distance learning.

Wireless broadband networks are a cost-effective, unobtrusive means of providing advanced communications services. As described in the attached report by Insight Research Corporation,[6] fixed wireless systems can be either point-to-point ("PTP") or point-to-multipoint ("PTM"). PTP systems provide very large data capacities and are dedicated to a single consumer or company. A PTP link is very similar to deploying a fiber optic line to a building. On the other hand, PTM systems have a central node or "base station" serving multiple customers.

When a fixed wireless broadband subscriber picks up a handset to place a call, the signal travels from the handset through a network interface via inside wiring to the

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[5] *See NPRM* ¶¶ 4, 9-15; *Rulemaking To Amend Parts 1, 2, 21, and 25 of the Commission's Rules To Redesignate the 27.5-29-5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 12 FCC Rcd 12545, 12552-53 (1997) (Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking); *Amendment of the Commission's Rules Regarding 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, 12 FCC Rcd 18600, 18603 (1997) (Report And Order And Second Notice Of Proposed Rule Making); Letter to Mr. Kenneth S. Fellman, Chairman, Local and State Government Advisory Committee, from William E. Kennard, Chairman, Federal Communications Commission, at 1 (dated Aug. 10, 1999).

[6] Wireless Broadband Access (WBA) Market Analysis, prepared by the Insight Research Corporation, 8-10 (Aug. 1999) ("*WBA Market Analysis*"). The report is attached as Appendix A.

service provider's electronics cabinet located somewhere in the building. An up/down converter converts the call to a high frequency radio signal. The signal is sent to a transceiver paired with a small wireless rooftop antenna—which is about the same size and weight as a satellite TV mini-dish—where it is relayed on a line-of-sight basis to the service provider's base station. The base station gathers the traffic, aggregates the signals, and routes them to the carrier's broadband switching center. Depending on the traffic's destination, the center delivers it to the public switched telephone network, an information service provider, or a private network.

Wired and wireless local telecommunications competition is growing but still in its earliest stages. Most consumers do not yet have a choice for either basic or advanced services. The Commission recognized in the *NPRM* and its most recent Local Competition Report that competition in the local telecommunications market has increased since passage of the 1996 Act.[7] Notwithstanding this progress, the FCC also acknowledged that competitive local exchange carriers ("CLECs")—only a small number of which are fixed wireless providers—collectively still account for "only five percent of local market revenues."[8] While significant strides have been made, wireless broadband technologies are far from realizing the goal of becoming "true" alternatives to wireline services.

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[7] *NPRM* ¶ 11; see Local Competition Report, Common Carrier Bureau, Industry Analysis Division, Dec., 1998.

[8] *NPRM* ¶ 11.

As detailed in the accompanying Insight Research market analysis prepared for PCIA, fixed wireless services will compete directly with wireline service providers.[9] With building access impediments removed, it is reasonable to expect wireless broadband services to prompt lower service prices and improved services as a competitive spur, lead to the development of new and more innovative services, and alleviate some congestion on the public switched telephone network. Indeed, barring market or regulatory impediments (including undue limitations on access to potential customers), fixed wireless broadband service lines are forecasted to account for as much as 19 percent of all broadband access lines in the U.S. by the end of 2004.[10]

This proceeding, then, is all about opening the local telecommunications marketplace to competition.[11] The Commission must recognize that increasing local competition entails a "rewiring" of America. Both wireline and wireless operators will be able to offer viable alternatives to the incumbent wireline services as well as advanced broadband services. As discussed below, however, these alternative service providers must first be able to reach customers desiring to subscribe to their services.

Both wireline and wireless operators are seeking a multitude of ways to reach potential subscribers, and the Commission needs to ensure that all competitors have a reasonable opportunity to compete for customers. This is important to American consumers, because, as Insight's market analysis shows, wireless technologies provide

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9 *WBA Market Analysis* at 8.

10 *Id.* at 30.

11 *See NPRM* ¶¶ 13, 17.

significant benefits over various wireline techniques when it comes to the rewiring of America. For example, broadband wireless technologies can be quickly deployed to end users, with minimal disruption to the community and the environment.[12] The deployment costs for wireless services usually are far less than for wired alternatives.[13] Thus, it is critical that the Commission ensure that wireless operators have the ability to provide service to those customers desiring the service.

To build the necessary environment in which private consumers and businesses can obtain service from the carrier of their choice, the Commission must ensure the availability of access to MTEs for the multiple service providers ready and willing to serve them. The Commission has noted that nearly one-third of Americans reside in MTEs.[14] Likewise, many businesses—small, medium, and large—have offices in MTEs.[15] Occupants of these MTEs, whether commercial or private, will be the initial customers for many fixed wireless providers.

Today, incumbent local exchange carriers ("ILECs") are in virtually every building, whether single family, MTE, or a complex dominated by a single business. This indisputable fact is in part a hold-over from the monopoly position formerly held by ILECs that was the creation of federal and state regulators. Builders, building owners,

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12 *WBA Market Analysis* at 27.

13 *Id.*

14 *See NPRM* ¶ 29 and n.58.

15 *See WBA Market Analysis* at 11 (stating that Census Bureau has reported that there are 4.6 million commercial buildings in the U.S.).

and building managers are accustomed to dealing with the incumbent local service provider as a matter of course, and have had no or little experience accommodating alternative carriers desiring to install their own facilities when a building is first erected or when an MTE tenant expresses a desire to use an alternative service.

Fixed broadband wireless operators need access to both newly constructed and existing buildings, and in particular need access to buildings containing a very large user or multiple tenants that might choose to subscribe to their services. This market-entry strategy has been utilized by and worked successfully for a significant number of wireline CLECs, and is now being used by wireless operators.[16] Initially targeting customers in MTEs to use their services will enable fixed wireless providers to gain a foothold in the local telecommunications market and establish a sufficient economic base to allow them to expand the scope and reach of their offerings. Wireless service providers will then be able to extend service to selected suburban and rural areas.

PCIA applauds the efforts taken by several states to permit new entrants access to MTEs. For example, Texas, Connecticut, and Ohio have adopted access laws or regulations precluding property owners from discriminating against CLECs with respect to access.[17] Nonetheless, the overwhelming majority of states have yet to address this

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[16] *See NPRM* ¶ 13 (stating that competition to date has primarily benefited businesses in urbanized areas.); *see also* Common Carrier Bureau Local Competition Report at 2, 5-6.

[17] See Texas Public Utility Regulatory Act § 54.259, *codified at* Tex. Util. §54.258; Connecticut General Statutes, §16-247*l*; *Commission's Investigation into the Detariffing of the Installation and Maintenance of Simple and Complex Inside Wire*, Case No. 86-927-TP-COI, Supplemental Finding and Order, 1994 Ohio PUC Lexis 778 at *20-21 (Ohio PUC Sept. 29, 1994).

critical issue. Without a national access requirement, fixed wireless providers in the majority of states lacking pro-competitive access requirements will not be able to meet the needs of certain classes of potential customers. In addition, in the absence of a federal policy, operators serving multiple states likely would be subject to a host of different access requirements, with some being more restrictive than others. Compliance with varied access requirements across different states could impede the effectiveness of competition. Without a federal solution mandating the types of access required by competing wireless service providers, these companies simply will not be able to compete due to the barriers erected between willing customers and their suppliers.

PCIA urges the Commission not to shy away from taking actions necessary to allow facilities-based local exchange competition to become a reality throughout this country. Carrying a great deal of promise, fixed wireless providers are a new breed of wireless operator eager to compete and offer an array of competitive, advanced telecommunications services to American businesses and consumers. Yet, millions of potential customers may not be afforded the opportunity to take advantage of their services unless the Commission adopts a building access policy that guarantees reasonable, non-discriminatory access to *all* telecommunications providers, and, in turn, all U.S. consumers.

II. THE COMMISSION SHOULD ADOPT BUILDING ACCESS REGULATIONS BASED ON PRINCIPLES THAT BENEFIT BUILDING OWNERS, CONSUMERS, AND CARRIERS.

In crafting regulations to ensure that all Americans have a real choice in selecting their telecommunications provider, the Commission should be guided by

several principles that form the basis for a building access scheme. Taken together, the impact of these principles will prove beneficial to building owners, consumers and businesses, and carriers.[18]

A. Non-discriminatory Access To Buildings.

Telecommunications carriers should compete on an equal footing for consumers and businesses in MTEs. They should not be barred from serving willing customers simply because a building owner or manager has a "deal" with another provider or has always dealt with just one provider as a matter of historical precedent. Thus, the terms, conditions, and compensation for the installation of telecommunications facilities in MTE buildings must not disadvantage one new entrant over another or new entrants vis-à-vis incumbent providers. Access to potential customers must be based on competition in service options, service quality and rates, not preferential arrangements over which a potential subscriber has no control.

B. Building Owners Should Receive Reasonable Compensation For Building Access.

Building owners should be compensated for use of their buildings, whether it is the rooftop, risers, conduit, phone closets, or other space. Rates should be non-discriminatory and related to costs. If the incumbent telecommunications provider in the building is not required to pay for access, competing providers also should not be

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[18] PCIA submitted a brief discussion of these principles to Congress in its May 12, 1999 letter to Representative W. J. (Billy) Tauzin, Chairman of the House Subcommittee on Telecommunications, Trade & Consumer Protection. PCIA provides further discussion of these principles herein.

required to pay for access (other than reasonable expenses of the building owner or manager related to providing the additional access).

The Commission need not establish actual rates or formulas for calculating rates, but should announce principles to guide the private negotiations of parties. Among other elements, the Commission should make clear that revenue sharing requirements are *per se* unreasonable because they are not cost-based, and may be used to deter competitive entry by making it impossible for new providers to recover their investments.

C. No Exclusivity.

Building owners should be prohibited from granting exclusive access to one telecommunications carrier or another. Such agreements unnecessarily favor incumbent providers and fly in the face of the 1996 Act's objectives to promote competition and provide consumers access to advanced telecommunications services.[19]

D. Carrier Assumption Of Installation And Damage Costs.

The installing carriers or their agents should assume the costs of installation and the responsibility for repairs and payments for damage to buildings or property therein. Building owners and the tenants occupying their buildings should be assured that the costs of any repairs for damages caused by facility installation will be assumed by the

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[19] PCIA recognizes that there are exclusive contracts in place. Tenants in such MTEs should have an opportunity to take a "fresh look" at their telecommunications service arrangements.

installing carrier. Competing carriers are not looking for a "free ride" but expect to pay the reasonable expenses incurred in providing service to the public.[20]

E. No Charges To Tenants For Exercising Choice.

Under no circumstances should a building owner or manager be permitted to penalize or charge a tenant for requesting or receiving access to the service of that tenant's telecommunications carrier of choice. Consistent with this policy, the carrier would be responsible for paying appropriate expenses and costs on a non-discriminatory basis, for providing service to its customers.

F. Commercial And Residential Multi-tenant Environments Should Be Included Within A Non-Discriminatory Building Access Requirement.

As a policy matter, both commercial and residential telecommunications consumers should be permitted to experience the benefits of competition envisioned by the 1996 Act. As a practical matter, in many urban areas it is not uncommon for one structure to accommodate both commercial and residential tenants, making enforcement of access distinctions between the two types of customers difficult. Small and medium-sized business tenants are often denied a choice of communications providers and do not have the clout in a building to compel the landlord to honor their choice of provider. Similarly, residential tenants often lack the ability to compel their landlord to permit them to choose their own provider of local telecommunications

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[20] Carriers and their agents should also expect to take full responsibility for any physical injuries caused by their facilities either in the installation or operational phases of their systems.

services. Thus, extending the non-discriminatory access requirements to all MTEs will help to bring telecommunications competition to a broader range of entities.

G. Reasonable Accommodation Of Space Limitations.

Space limitations in buildings most likely will not be an issue in practice. In the unlikely event that space limitations become a problem, it is appropriate to address them on a case-by-case basis in a non-discriminatory manner. Available remedies include limits on the time that carriers may reserve unused space within a building without serving commercial customers and requirements that carriers share certain facilities. The Commission has dealt with this concern in other settings, and there is no reason to think that concerns about space limitations should stand as an impediment to adopting these policies.

* * * *

The Commission should take immediate action to adopt a national non-discriminatory building access requirement premised on the foregoing principles.

III. THE COMMISSION HAS AMPLE AUTHORITY UNDER THE COMMUNICATIONS ACT, AS AMENDED, TO IMPOSE A NON-DISCRIMINATORY ACCESS REQUIREMENT ON BUILDING OWNERS.

A. Section 706 Of The 1996 Act Empowers The Commission To Adopt A Non-Discriminatory Access Requirement For Building Owners.

Section 706(a) of the 1996 Act directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by employing, among other things, "measures that promote competition in the local telecommunications market, or other regulating methods that

remove barriers to infrastructure investment."[21] As discussed above, denial of access to MTEs is a significant, critical barrier to the deployment of advanced telecommunications to business and residential consumers in MTEs. Such access restrictions are extremely unfortunate because, unlike wireline systems, installation of fixed wireless systems do not generally engender the same level of investment costs or construction time as wireline alternatives, yet offer a panoply of advanced telecommunications services, making fixed wireless services a viable alternative to wireline networks.[22]

Some of the advanced services available to consumers via fixed wireless systems include, as noted previously, fixed voice, high-speed data communications, virtual private network, Internet access, and distance learning.[23] Indeed, fixed wireless services offer significant advantages over wireline broadband services because they are faster, cheaper, and less obtrusive to existing facilities.[24] Moreover, preliminary market research shows that, with unfettered access to MTEs, market penetration for fixed wireless services will grow to 4.4 million access lines and account for approximately 19 percent of the broadband access lines in service in 2004, which would represent a compound average growth rate of 75.6 percent over the period from

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21 47 U.S.C. § 157 n.(a).

22 *Supra*, Sec. I; *WBA Market Analysis* at 8.

23 *See WBA Market Analysis* at 8.

24 *See WBA Market Analysis* at 27.

1998 through 2004.[25] Insight Research projects wireless broadband revenues approaching $1.8 billion in 2004 while a recent Ferris Baker Watts report estimates $3.5 billion in annual revenues by 2007.[26] The proliferation of fixed wireless providers in MTEs unequivocally would further the Commission's efforts to satisfy its Section 706 mandate to encourage the deployment of advanced telecommunications.

It is already well-documented that across the nation, many building owners have refused to allow fixed wireless service providers the necessary and reasonable access to their building facilities to deploy new broadband technologies.[27] The Commission will undoubtedly receive more such evidence in this proceeding. Without immediate action by the Commission, nearly one-third of Americans could be precluded from realizing the benefits of advanced telecommunications that fixed wireless providers can offer. There can be no dispute that Section 706 provides the Commission the requisite jurisdiction to take measures necessary to hasten the deployment of these services to business and residential consumers in MTEs.

Indeed, the legislative history of Section 706 states that it is the goal of this provision to "accelerate deployment of an advanced capability that will enable

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[25] *Id.* at 30.

[26] *WBA Market Analysis* at 30; Ferris Baker Watts, *Bring on the Bandwidth; An Investors Guide to Competitive Broadband Services,* July 1999, at 63.

[27] *See, e.g.,* Testimony of John D. Windhausen, Jr., President of the Association of Local Telecommunications Services, before the House Subcommittee on Telecommunications, Trade, and Consumer Protection (May 13, 1999); Testimony of William J. Rouhana, Jr., Chairman and CEO of WinStar, before the House Subcommittee on Telecommunications, Trade and Consumer Protection (May 13, 1999).

subscribers in all parts of the United States to send and receive information in all its forms—voice, data, graphics, and video—over a high-speed switched, interactive, broadband, transmission capability."[28] A non-discriminatory access requirement is precisely the type of "measure" that would help to achieve the goals of Section 706. Action by the Commission to ensure that rules, regulations, practices, and policies do not discriminate against or unfairly disadvantage fixed wireless operators and the services they offer is absolutely essential if the Commission is to satisfy the Congressional mandates of Section 706.

B. Sections 1, 4(i) And 303(r) Afford The Commission Broad Authority To Adopt A Non-Discriminatory Access Requirement For Building Owners.

The Commission also has clear authority under Sections 1, 4(i) and 303(r) of the Act,[29] as interpreted by the courts, to preempt restrictions that would otherwise preclude fixed wireless providers from delivering their telecommunications services. Section 1 directs the Commission to "make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide and world-wide wire and radio service. . . ."[30] Section 4(i) states that the Commission "may perform any and all acts, make such rules and regulation, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[31] Section 303(r) instructs that

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28 *1996 Conference Report* at 50-51 (emphasis added).

29 47 U.S.C. § § 151, 154(i), 303(r).

30 47 U.S.C. § 151.

31 47 U.S.C. § 154(i).

the Commission shall "as public convenience, interest or necessity requires, . . .[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of th[e] Act...."[32]

The courts have held that these provisions confer ancillary authority on the FCC to adopt rules to carry out other provisions of the Act. For example, the Eighth Circuit has determined that Sections 4(i) and 303(r) "supply the FCC with ancillary authority to issue regulations that may be necessary to fulfill its primary directives contained elsewhere in the statute."[33] Similarly, the Ninth Circuit has stated that Sections 4(i) and 303(r) confer on the FCC such power as is necessary to enable the agency to carry out its specific statutory responsibilities. [34]

These sections allow the Commission to adopt rules and policies that will advance the goals of Section 706 of promoting local competition and the deployment of advanced communications to consumers. Accordingly, the FCC can rely on these statutory provisions as additional Congressional authority to adopt a non-discriminatory access requirement for building owners to satisfy its Section 706 obligations.

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32 47 U.S.C. § 303(r).

33 *Iowa Utilities Board v. FCC*, 120 F.3d 753, at 795 (8th Cir. 1997) rev'd in part, aff'd in part, AT&T Corp. v. Iowa Utilities Bd., 119 S. Ct. 721 (1999); *see The People of the State of Calif. v. FCC*, 124 F.3d 934, 941 (8th Cir. 1997) (stating that Sections 4(i) and 303(r) "provide the FCC with ancillary authority to promulgate additional regulations that might be required in order for the Commission to meet its principle obligations contained in other provisions of the statute").

34 *People of the State of Calif. v. FCC*, 905 F.2d 1217, 1240-41 n.35 (9th Cir. 1990).

Moreover, the Supreme Court has held that the Commission's ancillary jurisdiction can exist even where the Communications Act does not explicitly apply.[35] The Court has also confirmed that Congress meant to confer "broad authority" on the Commission, so as "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission."[36] Thus, while the Communications Act does not directly address access to tenants in MTEs, Sections 1, 4(i) and 303(r) provide the Commission the necessary authority to adopt regulations essential to addressing issues concerning the provision of interstate communications to Americans. Adoption of a non-discriminatory access requirement clearly would be in keeping with the Commission's statutory mandate to ensure that all Americans have access to advanced telecommunications in a timely manner. Such a requirement also would promote the public interest by spurring competition for local telecommunications services and increasing consumer choices.

C. The Commission Has Ample Authority Under The Communications Act To Mandate Access To Facilities Used For Both Interstate And Intrastate Communications.

Sections 2 and 3 of the Communications Act grant the Commission broad authority to regulate instrumentalities and facilities incidental to the transmission of interstate services.[37] Facilities in MTEs utilized by fixed wireless providers to provide

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35 *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721 (1999).

36 *FCC v. Midwest Video Corp.*, 440 U.S. 689, 696 (1979), *quoting FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

37 47 U.S.C. §§ 2, 3(33). Likewise, the 1996 Act granted the Commission significant authority to promote local competition. *See infra* note 57.

interstate telecommunications services clearly fall within the Commission's jurisdiction under these statutory provisions. Likewise, facilities used for both interstate and intrastate communications fall within the Commission's jurisdiction where the facility carries more than a *de minimis* amount of interstate traffic. The Commission specifically addressed such a scenario in the context of special access lines. In the *MTS and WATS Proceeding,* the Commission assigned the cost of a mixed access line to the interstate jurisdiction where the line carried more than ten percent interstate traffic. [38]

Fixed wireless providers employ the same in-building facilities to provide both interstate and intrastate communication services to businesses and consumers in MTEs. Indeed, it is technically infeasible for these providers to use different facilities to provide intrastate services. As such, the Commission can exercise its jurisdiction under Sections 2 and 3 to regulate access to facilities used for intrastate communications because these facilities also will be used for interstate services.

IV. A NON-DISCRIMINATORY ACCESS REQUIREMENT IMPOSED ON BUILDING OWNERS IS CONSTITUTIONALLY ACCEPTABLE.

The *NPRM* specifically seeks comment on whether a non-discriminatory access requirement imposed on building owners would constitute an unconstitutional taking under the Fifth Amendment.[39] PCIA endorses Teligent's and WinStar's arguments that

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[38] *MTS and WATS Market Structure*, Decision and Order, 4 FCC Rcd 5660, at 5660 (1989); *see GTE Telephone Operating Cos.*, CC Docket No. 98-79, ¶ 27 (rel. Oct. 30, 1998).

[39] *NPRM* ¶ 58.

a non-discriminatory access requirement for building owners is permissible under the U.S. Constitution.[40] Teligent and WinStar each provide a detailed showing in their respective comments that such a requirement not only is fully consistent with the Fifth Amendment, but, further, that a non-discriminatory requirement would not constitute a "taking" under the Fifth Amendment.[41]

PCIA agrees with Teligent and WinStar that MTE access does not amount to a compelled initial physical invasion, but rather the assignment of non-discriminatory obligations to MTE owners, which in and of themselves do not necessarily trigger takings concerns.[42] If a property owner voluntarily consents to the physical occupation of its property by a third party (*e.g.*, a utility), any government regulation affecting the terms and conditions of that occupation is no longer subject to a *per se* taking analysis.[43] Put simply, once a property owner has voluntarily granted access to its property to a user, the federal government is permitted to regulate the terms and conditions of that access, including a requirement that comparable access be extended to others. Thus, a non-discriminatory access requirement would constitute merely a regulation prompted by the voluntary acquiescence of a property owner to allow occupation of its property by a third party, *not* a physical invasion of property requiring compensation under the Fifth Amendment.

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40 *See* Teligent Comments § VIII; WinStar Comments § IV.

41 *See* Teligent Comments § VIII.A.; WinStar Comments § IV.C.

42 *Id.*

43 *Id.*

Even if a non-discriminatory access requirement were to be deemed a taking, it would not necessarily be unconstitutional. Significantly, the Fifth Amendment expressly provides for takings. Further, the Supreme Court has conclusively determined that the taking of private property will be constitutional if the fee paid to the property owner "is a proper measure of the value of the property taken."[44] Thus, so long as just compensation is paid to the property owner in exchange for access, a non-discriminatory access requirement survives constitutional scrutiny.

A. Administrative Agencies Can Effect Takings.

The FCC has raised the issue as to whether it can adopt a non-discriminatory access requirement for building owners in light of the *Bell Atlantic v. FCC*[45] decision.[46] PCIA fully endorses Teligent and Winstar's comments that *Bell Atlantic v. FCC* is inapplicable because a non-discriminatory access requirement: 1) would not constitute a taking, and 2) would not be mandatory for building owners, but rather permissible.[47] Nonetheless, even if such a requirement amounted to a taking, it would survive constitutional muster because the Courts unquestionably have held that administrative agencies have the authority to effect takings so long as just compensation is paid.[48] Indeed, even the D.C. Circuit in *Bell Atlantic v. FCC* determined that an agency order

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44 *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

45 *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, at 1446 (D.C. Cir. 1994).

46 NPRM ¶¶ 55-58.

47 Teligent Comments § VIII; Winstar Comments § IV.

48 *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); (Continued...)

authorizing a taking would be upheld if any fair reading of the statutory section underlying the order would discern the requisite authority or "where the grant [of authority] itself would be defeated unless [takings] power were implied."[49] As demonstrated below, the FCC has the requisite authority to effect a taking under Section 706 of the Telecommunications Act of 1996.

B. The FCC May Effect A Taking Under Section 706.

1. A Fair Reading Of Section 706 Supports The Commission's Authority To Require Access To MTEs.

Section 706 requires the Commission "to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[50] A fair reading of this language demonstrates that the Commission has the requisite authority to impose a non-discriminatory access requirement on building owners. Congress adopted Section 706 to hasten the dissemination of advanced telecommunications to *all* Americans. To ensure that the Commission had the necessary tools to accomplish this goal, Congress specifically

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(...Continued)
Bell Atl. v. FCC, 24 F.3d at 1446.

49 *Bell Atl. v. FCC*, 24 F.3d at 1446 (citing Western Union Tel. Co. v. Pennsylvania R.R., 120 F. 362, 373 (C.C.W.D.Pa.), *aff'd*, 123 F. 33 (3d Cir. 1903), *aff'd*, 195 U.S. 540 (1904)).

50 Telecommunications Act of 1996 § 706(a).

required the agency to take measures to promote competition in the local telecommunications market and remove barriers to infrastructure investment.

Unquestionably, a lack of non-discriminatory access to MTEs is an absolute barrier to infrastructure development by competitive fixed wireless providers and is impeding the full development of local competition. Without an access requirement, businesses and consumers located in MTEs will be deprived of competitive choices for telecommunications services, specifically including advanced telecommunications services. Accordingly, if a non-discriminatory access requirement amounts to a "taking" under the Fifth Amendment, Section 706 provides the FCC the necessary authority to effect such a taking to achieve the goals of this statutory provision.

2. The Legislative History Of Section 706 Supports The Commission's Authority To Require Access To MTEs.

Likewise, the legislative history of Section 706 compels such a conclusion. The Senate Report associated with the 1996 Act states that one of the primary objectives of the Act is to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate *rapidly* private sector deployment of advanced telecommunications . . . ."[51] The report further states that, if the Commission determines that the deployment is not sufficiently rapid, it may use "other methods that remove barriers and provide the proper incentives for infrastructure investment . . . [and] . . . may pre-empt State commissions if they fail to act to ensure reasonable and

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[51] S. REP. NO. 104-23 (1995) (emphasis added).

timely access."[52] Discriminatory practices by building owners that deny fixed wireless providers the necessary access to provide advanced telecommunications services to tenants are exactly the type of "barriers" Congress anticipated. Such access restrictions inhibit: 1) infrastructure investment; 2) local telecommunications competition; and 3) the rapid deployment of advanced telecommunications to consumers in MTEs -- results wholly inconsistent with the goals of Section 706.

The clear language of Section 706 and its legislative history confirm that the Commission can use various "methods" to remove "barriers." A non-discriminatory access requirement is precisely the type of "method" available to the Commission to remove access barriers that impede the deployment of advanced telecommunications services. Congress has provided the Commission with the requisite authority to mandate compensated access to private property in order to carry out the goals of Section 706 and the general congressional goal of creating local telecommunications service alternatives.

V. SECTION 224 OF THE ACT REQUIRES THAT UTILITIES, INCLUDING ILECS, PROVIDE TELECOMMUNICATIONS CARRIERS ACCESS TO ALL THEIR OWNED OR CONTROLLED FACILITIES, INCLUDING ROOFTOP FACILITIES AND RISER CONDUITS LOCATED IN MTES.

PCIA agrees fully with the Commission's conclusions in the *NPRM* concerning the application of Section 224[53] (the Act's "pole attachment" provisions) to rooftops, risers, and conduits located in MTEs that are owned or controlled by utilities. These

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52 *Id.*

53 47 U.S.C. § 224.